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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL, RESPONDENT

ANSWER TO BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WARREN F. REYNOLDS
OF EASLEY & REYNOLDS

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Hobbs, New Mexico 88240

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SUMMARY OF ARGUMENT

Respondent urges that the warrantless inspection scheme under the Federal Gun Control Act of 1968 as to licensed dealer's records and ammunition is in violation of the "self protection" and privacy interests protected in the Fourth Amendment and the protection of the Fifth Amendment against self incrimination. That decisions in Camara v. Municipal Court, 387 U.S. 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) and See v. Seattle, 387 U.S. 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967) require invalidation of the inspection provision of the act.

Contrary to petitioner's argument, Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L Ed 2d 60, 90 S Ct 774 (1970) is not controlling because it did not specifically authorize warrantless administrative inspections. Rather it holds that the search was unreasonable because Congress provides no safeguards to make such reasonable.

Camara v. Municipal Court, Supra and See v. Seattle, Supra should be followed because Colonnade Catering Corp. v. United States, Supra did not overrule them and they stated that administrative inspection cases should be decided on a case-by-case basis. This Court should apply the test set out in Camara and adopted in See which was not done in Colonnade.

Camara v. Municipal Court, Supra rejected warrantless administrative inspections because they do infringe on

both privacy and "self protection" interests since violations of building codes usually carry sanctions. This Court should do likewise in this case because violations of the Gun Act are felonies.

In Camara v. Municipal Court, Supra this Court only required probable cause that there were violations of building codes in the area and not in a particular house, because area inspections were the only means of implementing the code, because the inspections were made to find and correct infractions and not to gather evidence for criminal prosecution and because there was historic public and judicial acceptance of such inspection schemes.

On the other hand, inspections under the Gun Act should not be allowed unless a warrant issue based on probable cause that the dealer has not complied with the Act. Unlike building codes, enforcement of the Gun Act will not be frustrated by requiring such probable cause because Congress provides tools for implementation, such as record keeping and reports to the Secretary. Further, improper records, such as in this case should raise probable cause of other violations. Also, failure to report should do likewise, both are felonies.

Further, inspection under the Gun Act is criminal in nature rather than civil and the penalty for noncompliance is a felony conviction. It represents a serious invasion of the "self protection" interest. Also, there is no historic public and judicial acceptance of gun laws and inspections thereunder.

Even if this Court holds that probable cause that a particular dealer did not comply with the Act would frustrate the purposes of the Act, a lesser probable cause would not. Contrary to what petitioner states, length of time and crime in the area could be considered as probable cause to issue a search warrant.

To buttress his argument that a warrantless inspection is valid, petitioner in the alternative states that since respondent voluntarily sought the dealer's license knowing inspections were required, he impliedly consented to them. This is contrary to this Court's holdings that a constitutional right can't be taken in return for a privilege given by the state, Frost v. Railroad Commission, 271 U.S. 583, 70 L Ed 1101, 46 S Ct 605 (1926).

Even if this Court holds that Colonnade Catering Corp. v. United States, Supra, validated warrantless inspections in the liquor industry and they are valid as to gun dealers, there is no valid distinction between the two cases. In Colonnade this Court held that a search warrant must issue on probable cause because the statute contained no safeguards against an unreasonable search.

The Gun Act contains none either, because it forces a dealer to incriminate himself since inspection is mandatory. Although in Colonnade Catering Corp. v. United States, Supra, no suggestion was made by this Court as to what safeguards are necessary, petitioner suggests a similar safeguard as that enacted in the National Firearms Act in 1968, that is, any information or evidence secured by the

registration requirements of that Act could not be used for prosecution of prior or concurrent crimes. In the Gun Act, a similar provision could be enacted to the effect that no evidence or information obtained from an inspection could be used for prosecution of prior or concurrent crimes. This would protect the dealer's right to "self protection" and protection against self incrimination.

Respondent's consent to the inspection after the treasury agent read him the Act authorizing inspection while in the company of a local police officer was illegally coerced and not valid. Under Bumper v. North Carolina, 391 U.S. 543, 20 L Ed 2d 797, 88 S Ct 1788 (1968) this Court held that consent obtained under color of authority which later turns out to be invalid is not voluntary. Further, this Court has held consent to the authority of "color of office" is likewise coerced and not legal. Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948). That under these circumstances, respondent's consent to the inspection was not valid.

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ANSWER TO STATEMENT OF THE CASE

In answer to petitioner's Statement of the Case, respondent adds the following facts to clarify the circumstances surrounding this case.

Respondent is in the Pawn & Loan business in Hobbs, New Mexico. In the regular course of business he makes loans on guns owned by individuals. For two different individuals he made loans and gave receipts on two single-shot, twenty-two caliber rifles which were shortened. One individual received a $3.00 loan and the other a $3.50 loan. There was no

evidence that they knew the guns were illegal, nor was the respondent aware that "...a little, old single-shot rifle..." was illegal. Although respondent learned when he was a policeman that sawed-off shotguns and machine guns were illegal, he hadn't learned that about sawed-off rifles. (A.13-19, 43-47, 50-51, 58)

The respondent openly made the loans on the two guns in the public part of his business with other customers present. He then had the guns placed in the open in his storage room where police officers frequented before. The doorway to the storeroom had a sign stating, "No Admittance, employees only," This was the place that respondent did not want Hupp to inspect. These were the two guns seized by Hupp. When seized, the guns were still redeemable by the persons pawning them who planned to do so, but were prevented by the seizure. (A.9, 13-19, 28-29, 37-40, 56)

ARGUMENT

ANSWER TO POINT I

THE AUTHORITY GRANTED BY CONGRESS TO TREASURY AGENTS TO MAKE WARRANTLESS INSPECTIONS OF THE PRIVATE PORTIONS OF BUSINESS PREMISES OF LICENSED FIREARMS DEALERS IN ORDER TO EXAMINE RECORDS WHICH ARE REQUIRED BY STATUTE TO BE KEPT, AS WELL AS FIREARMS DOES VIOLATE THE FOURTH AMENDMENT

At the outset Petitioner maintains that the basic issue "...is whether the warrantless inspection authority

> search, Oklahoma Press Pub. Co. v Walling, 327 US 186, 202, 90 L ed 614, 625, 66 S Ct 494, 166 ALR 531, is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises."

It is respondent's position that since Colonnade did not specifically overrule Camara and See and did not specifically state it sanctioned warrantless inspections in such areas as the liquor industry that Camara and See control.

Camara and See have been followed in two cases since as follows: United States v. Kramer Grocery Co. 418 F 2d 987 (8th Cir. Ark. 1969)(Food and Drug Inspection); United States v. Stanack Sales Co., 387 F 2d 849 (3rd Cir. N.J. 1968)(Food and Drug Inspection); See also United States v. Sinclair, 321 F Supp 1074 (E.D. Mich., S.D. 1971)

Further, in an attempt to justify the exception being urged petitioner has stated alleged facts not of record to which respondent objects. None of the facts stated in footnotes 7, 10, 11, and 12 of petitioner's brief to justify the exception are of record except the location of the magistrate in Carlsbad. (A.36-37)

The petitioner obviously is attempting to buttress his burden below of establishing that the search was or any search under the act without a warrant is reasonable when he attempts here to make use of acts not of record. This Court has held that:

> "Searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions..." Katz v. United States, 389 U.S. 347, 357, 19 L Ed 2d 576, 585, 88 S Ct 507 (1967) (Emphasis added)

> "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51, 96 L Ed 59, 64, 72 S Ct 93 (1951)

It is respondent's position that in the case below the prosecution did not meet this burden. The recognized exceptions to the need for a search warrant are where the search is incident to a valid arrest or in "exceptional circumstances" such as where violence, a moving vehicle, "...or imminent destruction, removal or concealment of the property intended to be seized..." is involved. Id. at 52, 96 L Ed at 64; See Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948)

In the case at bar no arrest was being made at the time of the search nor were there any facts bringing the search without a warrant within the other recognized exceptions. There was no emergency and as in United States v. Jeffers, Supra the officers "could have easily prevented any... destruction or removal [of illegal guns] by merely guarding the door." Id. at 52, 96 L Ed at 69. This is equally true of any search under the act where none of the recognized exceptions are present.

As in Johnson v. United States, Supra the only reasons offered here for not obtaining a search warrant are inconvenience to the officers and implementation of the program in the Gun Act. In reference to inconvenience this Court in Johnson stated that:

> "These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." Id. at 15, 92 L Ed at 441.

Petitioner argues that guns and ammunition could be easily spirited away while awaiting a warrant. The size of objects in of themselves has never been held by this Court to create an emergency. Further, such factors as limited manpower, geographic dispersion of dealers and long distances to judges are urged by petitioner as justification for doing away with warrants. Such factors merely point to inadequacy in all areas of Federal criminal and civil enforcement. More agents and judges would solve this problem not only as to enforcing the Federal Gun Act but as to all other Federal Acts. Such factors also have never been considered by this Court in creating an exception to the need for a search warrant. Certainly, economics as a factor in limiting or taking a constitutional right should not be considered.

That leaves the question of implementation of the act and the tests provided in See and Camara.

In Camara this Court reversed the District Court's decision which was based on the authority of Frank v. Maryland,

Supra. Camara discussed the factors in Frank which persuaded the majority to rule as it did and rebutted them as follows:

First, Frank stated that since the inspector under a building code is not making a search for evidence of a criminal nature which could cause the occupier's criminal conviction, "...historic interests of 'self protection' jointly protected by the Fourth and Fifth Amendments..." are not involved, only the lesser interest of personal privacy. Camara v. Municipal Court, Supra at 530, 18 L Ed 2d at 936.

Camara stated that it disagreed with the majority in Frank that Fourth Amendment interests at stake in investigative cases are merely "peripheral." Id. at 530, 18 L Ed 2d at 936. That a law abiding citizen has as much right as a suspected criminal to limiting circumstances under which the sanctity of his home is broken. This Court in See adopted the views in Camara to apply to private areas of a place of business such as respondent's.

Further, the Court in Camara stated that such inspections "...do in fact jeopardize 'self protection' interests...", Id. at 531, 18 L Ed 2d at 936, since most building codes are subject to criminal sanctions which can be discovered by inspections. This applies even more so to this case because unlike the building codes in Camara and See which involve misdemeanors for infractions, violations of the Federal Gun Act are made felonies, that is up to five years imprisonment or up to a $5,000.00 fine or both. 18 U.S. C. 923(c). The act is criminal in nature. It is even listed in the code under

"Crimes and Criminal Procedure". This is manifested further by legislative history of the act which states that the principal purpose of the Gun Control Act of 1968

> "...as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders."

and give the general statement that

> "The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."

3 U.S. Congressional and Administrative News, 1968, pp. 4410, 4411, 4412.

Next, Frank justified warrantless administrative searches because they are hedged with safeguards such as an inspector must display proper credentials inspect at reasonable times and may not enter by force unless there is an emergency; and at any rate his decision to

enter must comply with the constitutional standard of reasonableness. In Camara this was rejected because when the inspector demands entry the property owner has no way of knowing the lawful limits of his power to inspect and whether he is acting under proper authority.

In this case the petitioner argues that this is not applicable to licensed gun dealers because they are furnished the law and regulations by the Secretary. Respondent believes there is no valid distinction from the facts in Camara. In that case the inspector was required to present proper credentials. Further, the inspection provision required apartment house owners to pay an annual license fee in part to defray periodic inspections; that they had to have this license before they could obtain a permit of occupancy which prescribed the apartment units a building can contain.

Certainly an apartment house owner by having to pay for a license which defrays costs of inspection before he can obtain a permit of occupancy is as well aware of the law involved as a gun dealer. Further, we are all presumed to know the law. On the other hand the average citizen is not presumed to be able to interpret and apply the law and specifically, in this case the limits of the power to search and whether or not it is being conducted under proper authority. Only a lawyer or a judge versed in the law is expected to be able to do this. In the words of Camara, these questions can be reviewed by an unbiased magistrate without frustrating the basic agency reasons for inspection, if reasonable.

In Camara this Court stated that only by refusing inspection and risking a criminal conviction for such refusal can the occupant challenge the decision to inspect. If convicted because of the refusal, he may never learn any more than that the law allows entry to inspect. There is no distinction in the case at bar. As pointed out by the petitioner, refusal to allow inspection would be a violation of the Federal Gun Act, subjecting the dealer to a felony conviction. If he had been convicted of that, he might never have learned any more than that the law allows entry to inspect. Further, he might never have learned if the inspector's decision to enter complied with the constitutional standard of reasonableness unless he challenged his conviction as in Camara and See.

In the words of Camara, "The practical effect of this system is to leave the occupant to the discretion of the official in the field." The Court said this is the very discretion it has "...consistently circumscribed by a requirement that a disinterested party warrant the need to search. Id. at 532-533, 18 L Ed 2d at 937. That in the administrative search area statutory safeguards are no substitute for review by a Court; especially, "...when these safeguards may only be invoked at the risk of criminal penalty." Id. at 533, 18 L Ed 2d at 937. This is what respondent faced in this case.

Thus petitioner's argument that there is only minimal danger because of statutory safeguards in the Federal Gun Act limiting the agent to inspect guns and required business records on the premises during business hours is not

valid since respondent was subject to felony convictions which was the result in this case and since it is contrary to this Court's holding in Camara and See.

Further, petitioner overlooks the "Plain View Doctrine," that is, although the officer's original entry is limited to inspection of guns and records once he is on the premises and sights evidence of a crime that is in plain view such evidence is admissible in a prosecution for another crime. Harris v. United States, 390 U.S. 234, 19 L Ed 2d 1067, 88 S Ct 992 (1968). The protection of the Fourth Amendment that calls for search warrants to specify what items can be seized is thereby circumvented. Stanford v. Texas, 379 U.S. 476, 13 L Ed 2d 431, 85 S Ct 506 (1965)

Furthermore, the ordinances and statutes involved in See v. Seattle, Supra and Camara v. Municipal Court, Supra which petitioner attempts to distinguish also limit inspections to the subject matter of the enactments. In Camara right to inspection is limited to reasonable times. These limitations were not held by this Court to be a safeguard of the reasonableness standard of the Fourth Amendment.

Petitioner buttresses his argument in this area by stating that respondent voluntarily sought and obtained a gun license and, therefore, can't expect freedom from inspection without a warrant. Respondent points out that he dealt in guns prior to 1968, the year the Federal Gun Act was enacted. (A.58) He didn't voluntarily buy a licence. He had to in order to continue to sell guns. Further, Camara is not distinguishable since an apartment

house owner had to buy a license before he could get an occupancy license.

Petitioner, in fact, argues in the alternative that since respondent "voluntarily sought and obtained a license" with knowledge that the firearms were subject to inspection he impliedly consented to "...inspections as condition for doing business."

This is contrary to decisions of this Court as to licensing away of other constitutional rights. In Frost v. Railroad Commission, 271 U.S. 583, 593-594, 70 L Ed 1101, 1104, 46 S Ct 605 (1926) this Court said

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."

> "If the state may compel the surrender of one constitutional right as a condition of its favor it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existense."

Further, the U. S. Court of Appeals for the District of Columbia stated in

Standard Airlines v. C.A.B., 177 F 2d 18, 20 (D.C. App. 1949) that, "The government cannot make a business dependent upon a permit and make an otherwise constitutional requirement a condition to the permit." See also, United States v. Hammond Milling Co., 413 F 2d 608, 612 (5th Cir. Fla. 1969) cert. denied 396 U.S. 1002 (1970): "No warrantless search is forced upon an individual or a factory."

More specifically, this Court had held that even though premises are subject to inspection or regulation this does not remove them from the Fourth Amendment protection. Mancusi v. DeForte, 392 U.S. 364, 372, n.11, 20 L Ed 2d 1154, 1161, 88 S Ct 2120 (1968), where Mr. Justice Harland pointed out for the Court:

> "The Court's opinion in Davis v. U.S., 328 U.S. 582, does contain dicta to the effect that there is a lesser right to privacy when the government officials have a 'right' to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case 'did not involve a search warrant issue'. See v. Seattle, 387 U.S. 541, 545, n.7" See also U.S. v. Kramer Gro. Co., 418 F 2d 987 (9th Cir. 1969).

In Mancusi the Court rejected the contention that the records seized were not entitled to Fourth Amendment protection as they belonged to the labor union (not to Deforte, the union official from whom they were seized) and were thus subject to government inspection.

If credence is given to petitioner's argument, dangerous precedence would be created for local, state and federal legislation licensing away the constitutional right under the Fourth Amendment. The Supreme Court of Michigan aptly stated in People v. Younger, 327 Mich. 410, 42 N.W. 2d 120 (1950):

> "Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the state. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office, or other place where a licensed activity occurs?"

Next, the Court in Frank stated public interest demanded such warrantless administrative searches. The Court in Camara countered by stating that:

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate

> the governmental purpose behind the search." (Emphasis added) Id. at 533, 18 L Ed 2d at 938

Although Camara rejected the appellant's argument that before a search warrant is issued, there should be probable cause that the particular house to be searched contains a violation because such a requirement would frustrate the purpose of the code, it held that in cases not involving a criminal investigation

> "In determing whether a particular inspection is reasonable--thus in determing whether there is probable cause to issue a warrant for that inspection--the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." Id. at 535, 18 L Ed 2d at 939

That since it was unanimously agreed that the only effective way of enforcing the code was by "routine periodic inspections of all structures" in an area, all that was needed for issuance of a warrant to allow inspection was probable cause to believe that all houses in the area could have defects.

The reasons given by Camara for not requiring probable cause that the occupant had committed a violation were that:

1. The inspection was unlike a criminal investigation since its purpose was to secure city wide compliance; that it was not personal in nature nor aimed at discovery of evidence of crime and only involved limited invasion of privacy.

2. Public interest demands that all dangerous conditions be prevented or removed, even unintentional ones.

3. It is unanimously agreed that the only way to enforce the code is by periodic inspection of all buildings; that it is doubtful any other technique would work.

4. Inspection provisions in building codes have a long history of public and judicial acceptance.

It is respondent's position that unlike the building code, for an inspection to be reasonable under the Federal Gun Act, there should be probable cause that the dealer is not complying with the act before a search warrant issue. The inspection provision in the Federal Gun Act is distinguishable as it is aimed at evidence of a crime since all violations are felonies. It is not impersonal in nature with the primary interest of preventing even unintentional violations as is found in building codes. It does involve a significant invasion of the "self protection" interest guaranteed by the Fourth and Fifth Amendments since it forces self incrimination of the commission of felonies. This danger was even noted in Frank v. Maryland, Supra.

Unlike building codes and liquor codes, inspection provisions in gun control acts, let alone the acts themselves, have not had long historical acceptance by the public and judiciary. In fact, this Court can take judicial notice of the up cry

that arose against the Federal Gun Act when it was proposed to the Congress in 1968. It is a dilution of the right of a citizen to keep and bear firearms guaranteed not to be infringed upon in Amendment II of the Constitution of the United States and a restriction on the long followed tradition and practice in the United States of citizens bearing arms for protection and sporting purposes.

Finally, as for public interest, there is no doubt that there is great need for insuring that gun dealers comply what with the increase in crime rate and the misuse of firearms in recent years. On the other hand, Congress has given the treasury department tools with which to work with that should cause compliance without resort to warrantless searches without probable cause. The act requires the keeping of records and reports to the treasury department. 18 U.S.C 923 (g)

Further, the act requires careful screening of all applicants for gun dealer licenses. 18 U.S.C 923 (a)(c)(d)(e)(f). Therefore, Congress contemplated that only honest, law abiding citizens receive licenses to insure compliance. It is an anomaly that once such citizens receive licenses they are then presumed to be highly suspect of engaging in illegal traffic of guns so that warrantless searches without probable cause are necessary to insure that they don't engage in such activities. This is in effect a presumption that they are guilty of such acts until they are proven innocent by inspections which is in direct opposition to the basis of our Anglo-Saxon jurisprudence of criminal law that a man is innocent until proven guilty. Further, such legislation

does in effect what this Court has prohibited as noted before, take away a constitutional right for the privilege, so called, to deal in guns.

Also, it assumes that the average dealer will refuse inspection of records and guns which is doubtful. No evidence of this was introduced in the Court below. In balancing the rights of gun dealers to privacy and "self protection" with the interest of the public of compliance with the Gun Act, the few instances of refusal would only cause minimal frustration of enforcement of the act.

To the contrary, under the Gun Act, the requirement of sufficient probable cause that the dealer has not complied with the act as determined by a magistrate before issuing a search warrant will not frustrate the purpose of the act. As noted before, records must be kept available and reported on. If as in this case, the dealer's records weren't properly kept, this being the first inspection for a year since enactment of the Act in 1968, such would be probable cause for an inspection. (A.9, 26-27, 45) Without proper records, complying and tracing are frustrated and would be reasonable grounds for a warrant for inspection of guns and ammunition.

Further, if a dealer failed to send in reports, then this also should be probable cause for a warrant issued for inspection. Such refusal or failure would again be a frustration of the goals of the act.

Finally, all instances of improper records and failure to submit reports on them would be crimes since the statute and regulations in respect thereto are

mandatory. As noted by petitioner, all violations of the act and regulations are felonies. This would enable an arrest warrant issued and a search of the dealer's premises incident to the arrest and crime charged, as could have been done in the case at bar since respondent's records were improper. Also, since a crime had been committed, this would create probable cause that in connection with that crime, other crimes concerning guns themselves had been committed.

Even if this Court holds that there need be no probable cause to believe that the individual gun dealer had not complied, respondent's position is that contrary to petitioner's argument, a warrant should be required on at least probable cause that dealers in the area are not complying.

In the case at bar the petitioner argues that unlike inspections under building codes, there are no factors that a magistrate could consider to determine whether an inspection would be reasonable and is needed in order to implement the reasonable goals of the act. That such factors as passage of time and condition of the neighborhood would not establish probable cause that a particular gun dealer was not complying. That the Secretary or his agent need random and surprise inspections without exercising discretion as to probable cause to implement the objectives of the act. Respondent disagrees because periodic inspections would detect whether or not the dealer was complying with the act. In fact Huff testified that the treasury agents try to contact a dealer at least once a year. (A.26) Also contrary to what petitioner argues, a wave of criminal activity in the dealer's

locality and prior violations on the part of the particular dealer would be considerations relevant to whether probable cause existed for issuance of a warrant.

In this case the facts that this was the first inspection a year after the enactment of the act and that respondent's records were inadequate could be considered as probable cause of possible violations including unintentional ones since his records had never been reviewed. (A.9, 26-27, 45)

What the petitioner advocated is just the situations the Fourth Amendment prohibits--unrestricted harassment and invasion of privacy at the whim of the Secretary and his agent, without probable cause that the purposes of the act are not being complied with.

Even if this Court holds that Colonnade Catering Corp. v. United States, Supra held that warrantless inspection with regard to the liquor industry can be constitutional and that under the same principles they can be constitutional as to dealers in firearms, as in Colonnade the Gun Dealer Act in its present form does violate the Fourth Amendment.

As noted before, petitioner attempts to narrow this Court's holding in Colonnade to that of an unreasonable search and seizure because Congress "...had not authorized forcible entries without a warrant..." Actually this Court's broad holding was that:

"Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and

its various restrictive rules apply." Id. at 77, 25 L Ed 2d 64

Thus it is respondent's position that Colonnade stood for the proposition that there must be reasonable provisions within the act authorizing inspections to safeguard the constitutional right of a proprietor from unreasonable search and seizure. The true basic issue before this Court is whether there are reasonable provisions within the Federal Gun Control Act for inspection of guns stored in a private storeroom on the business premises without a warrant.

It is petitioner's position that as in Colonnade, Congress in the Federal Gun Control Act has "...made no rules governing the procedure that inspectors must follow." Lacking them, the inspectors must obtain a search warrant unless the gun dealer voluntarily consents to the inspection. Even if the holding in Colonnade was restricted narrowly as petitioner argues, it would be applicable in the case at bar. As in Colonnade, Congress in the Federal Gun Control Act did not authorize forcible, warrantless entries. A coerced entry is not any more legal than a forced entry. Bumper v. North Carolina, 391 U.S. 543, 20 L Ed 2d 797, 88 S Ct 1788 (1968). Further argument on why there was a coerced entry in this case is contained in respondent's answer to petitioner's Point II.

Although this Court in Colonnade v. United States, Supra offered no examples of what reasonable provisions could be included in the act to safeguard a proprietor from unreasonable search and

seizures, respondent suggests the following:

A provision similar to the one enacted in 1968 amending the National Firearms Act could be provided in the Federal Gun Act.

The National Firearms Act prior to 1968 was condemned by this Court in Haynes v. United States, 390 U.S. 85, 98, 19 L Ed 2d 923, 933, 88 S Ct 722 (1968) as unconstitutional because compliance with the act by registering a firearm was self incriminating. That a claim of privilege against self incrimination is a full defense under 26 U.S.C. 5841 for failure to register a firearm or under 26 U.S.C. 5851 for possession of an unregistered firearm. This Court's reasoning was that the registration section forces the defendant to incriminate himself in that he would be admitting he possessed an unregistered firearm.

In this case the respondent is in the same position. By obtaining a dealer's license he submits himself to required warrantless inspections. He is on the horns of a dilemma. If he refuses, he is subject to a felony conviction. If he consents, he is subject to felony convictions for any infractions of the act. The mandatory inspection section forces the dealer to incriminate himself, thus making the search unreasonable.

To get around the holding in Haynes v. United States, Supra, Congress amended the National Firearms Act in 1968 by providing:

> "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a

natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall...be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." 26 U.S.C. 5848 (a)

This Court in United States v. Freed, U.S. ___, 28 L Ed 2d 356, 91 S Ct ___ (1971) held that the National Firearms Act no longer violated the self incrimination clause in the Fifth Amendment because the information obtained through registration could not be used in prosecution for prior or concurrent offenses.

Thus it is respondent's position that as in the National Firearms Act prior to 1968 the Federal Gun Act does violate the Fourth and Fifth Amendments. By requiring the dealer to submit to an inspection under threat of a felony conviction, it forces him to incriminate himself in violation of the Fifth Amendment. This in turn violates the Fourth Amendment because by forcing him to incriminate himself, the search and seizure are unreasonable. The only reasonable provision which could be included in the act would be one of similar wording to that included in the National Firearms Act; that is any and all information and evidence secured from an inspection of a dealer's records and guns and ammunition cannot be used against him in prosecution for prior or concurring offenses. That at the most, he be subject

to a revocation after a fair hearing for infractions discovered in the inspection. This would satisfy implementation of the purposes of the act and insure that the dealer's constitutional right to "self protection" and right against self incrimination are safeguarded.

ANSWER TO POINT II

THE INSPECTION AND SEIZURE IN THIS CASE WERE NOT REASONABLE BECAUSE CONSENT WAS COERCED BY AN UNCONSTITUTIONAL STATUTE AUTHORIZING A SEARCH WITHOUT A WARRANT AND BY THE BADGES OF AUTHORITY OF THE OFFICERS

Petitioner's argument in Point II necessarily depends upon whether or not the inspection provision in the Federal Gun Control Act did away with the need for a search warrant. Petitioner assumes that it did, therefore eliminating the element of coercion by use of an unconstitutional statute.

Obviously, if Sec. 923 is unconstitutional, then it cannot be said that the respondent voluntarily waived his right to a search warrant when induced by the authority of an unconstitutional piece of legislation. This Court has stated on many occasions that acquiescence to the claim of lawful authority is not a voluntary consent to search and seizure without a warrant. Bumper v. North Carolina, Supra; Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948); Amos v. United States, 255 U.S. 313, 65 L Ed 654, 41 S Ct 266 (1920); Go-Bart Importing Company v. United States, 282 U.S. 344, 75 L Ed 374, 51 S Ct 153 (1931);

United States v. Lefkowitz, 285 U.S. 452, 76 L Ed 877, 52 S Ct 420 (1932); in inspection cases as to coercement of consent see United States v. Stanack Sales Co., Supra; United States v. Kramer Grocery Co., Supra; See also United States v. Sinclair, 321 F Supp 1074 (E.D. Mich., S.D. 1971)

In Bumper v. North Carolina, Supra this Court stated:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justifed on the basis of consent if it turns out that the warrant was invalid..." Id at 548-549, 20 L Ed 2d at 802

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion--albeit colorably lawful coercion. Where there is coercion there cannot be consent." (Emphasis added) Id. at 550, 20 L Ed 2d at 802

Furthermore, in this case the consent to entry to the private storeroom is also tainted by the fact it was given to Hupp, a treasury agent, not a mere building inspector as in Camara and See, and local

police officer with whom respondent was familiar. (A.19-20, 28, 38-39)

This Court and other Federal Courts have also condemned consents to searches as coerced when gained by officers of the law "...under color of office," Johnson v. United States, Supra at 13, and "'under color of the badge'". Cipres v. United States, 343 F 2d 95, 98 (9th Cir. S.D. Cal. 1965), cert. denied, 385 U.S. 826, 87 S Ct 58, 17 L Ed 2d 62 (1966)

In Johnson v. United States, Supra at 13 this Court said:

> "It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."

Thus, in the case at bar it is respondent's position that under the facts, he was coerced into consenting to the search of the storeroom where the two guns were found and seized. When the agent informed him that under the law he was authorized to inspect the storeroom, respondent believed him and acquiesced to the search. Liken to an invalid search warrant, authority under the statute to inspect the storeroom, "cannot later be justified on the basis of consent if it turns out the...(statute) was invalid". Bumper v. North Carolina, Supra at 549, 20 L Ed 2d at 802. Further, he was faced with two law enforcement agents to whose authority he submitted.

CONCLUSION

In view of the aforesaid, it is respectfully submitted that the judgment

of the Court of Appeals should be affirmed.

Respectfully submitted,

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